

CANADA / JUDGMENT

Khural v. Sandhu

2022 BCSC 452

COURT

Supreme Court of British Columbia

DECIDED

18 March 2022

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2022 BCSC 452 Khural v. Sandhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khural v. Sandhu,

2022 BCSC 452

Date: 20220318

Docket: S207458

Registry: New Westminster

Between:

Amitoz Kaur Khural

Plaintiff

And

Lalit Gill and Sukhwinder Sandhu

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on June 10, 2022

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Malik

S.S. Singara, Articled Student

The Defendants, appearing on their own behalf:

L. Gill and S. Sandhu

Place and Dates of Trial:

New Westminster, B.C.

September 13-17, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 18, 2022

Introduction

- [1] This is an action by the plaintiff, Amitoz Khural, for breach of a contract of purchase and sale of a townhouse in Surrey. Among other remedies, she seeks forfeiture of the defendants' \$20,000 deposit and an order that they pay the agreed amount of rent for the additional period during which they have remained on the property, which was \$24,090 at the conclusion of trial.
- [2] The defendants, Lalit Gill and her spouse Sukhwinder Sandhu, contend that the agreement in question was modified by a subsequent oral one, which allowed them to purchase a different unit in the same complex (which was owned by Ms. Khural and her mother) instead, or that they were dissuaded from completing the original purchase by representations about the availability of the other unit. They also claim that there was an oral agreement that certain portions of their rent for the unit they were living in was to be allocated towards their purchase deposit. They have a counterclaim seeking specific performance of the agreement in relation to the original unit, because of its allegedly unique qualities.
- [3] Ms. Khural made a summary trial application in February of 2021. The summary trial judge was unable to find the necessary facts to grant judgment, in particular on the issue of when and by whom the agreement may have been repudiated[1]. Although the affidavits in support of that application were filed as part of the trial material, I have not reviewed or considered them except to the extent that they were referred to in the testimony of the witnesses in this trial.
- [4] The defendants' counsel withdrew shortly before this trial, and so Ms. Gill conducted the defence on behalf of herself and Mr. Sandhu.

Evidence

Plaintiff

- [5] The townhouses in question are part of a complex on 70th Avenue. The unit that was the subject of the original agreement is #17. Although Ms. Khural is the registered owner of it, her father Harjinder Khural handled most of the dealings with the defendants, and there is no dispute that he acted as her agent in doing so.
- [6] Ms. Khural bought #17 in 2015. After the purchase her father helped her to rent it out. He advertised its availability, and eventually came to an agreement with the defendants to rent it on what he described as a "rent to own basis". The terms of this agreement were reduced to writing, using a standard form real estate contract. It was entered into by the parties on March 1, 2015.
- [7] The agreement provided that the purchase price was to be \$449,000. A \$20,000 deposit was required - \$10,000 within 24 hours of acceptance and another \$10,000 by May 15 of that year.
- [8] The completion date was to be February 29, 2016, but the parties then agreed to extend the completion date "up to one year (28 Feb 2017)" by a written addendum. There is no dispute that this addendum was entered into on the same date as the main written agreement. Mr. Khural testified that the ability to extend the completion date was added after the defendants expressed concern about whether they would receive an ICBC settlement, that they were relying on to fund the purchase within a year.
- [9] The addendum also provided that the deposit was not refundable "in case of buyer cancel[] or withdraw for any reason".
- [10] Among the pre-printed clauses in the agreement was what is commonly known as an "entire agreement clause", confirming that there were no "representations, warranties, guarantees, promises or agreements" other than those set out in the agreement.
- [11] A standard form "residential tenancy" agreement was entered into by the parties at the same time. It provided for a one-year term, with rent of \$2,000 per month. The tenancy agreement had its own addendum, and included terms that the tenants were responsible for paying the strata fees and the "utilities bill i.e. hydro/electric". They were also to look after "minor repairs" themselves but "major repairs" were to be reported to the landlord.
- [12] The addendum to the purchase and sale agreement provided that the terms of the tenancy agreement, which I infer had been signed before the issue of an extension of the completion date arose, were to continue until the new completion date. It also provided that the rental agreement was part of the purchase and sale agreement.
- [13] The agreements do not contain a term that any of the monthly rent was to be applied to the purchase price.
- [14] Ms. Khural agreed in cross-examination that she had signed a letter that had been requested and prepared by Ms. Gill, dated March 30, 2015, that confirmed that the monthly rent was "\$1,500.00 plus utilities". She theorized that the addition of the utilities to that amount of rent

added up to roughly \$2,000 - the amount of rent that was actually being at that time - but pointed out that the letter did not suggest that any of the rent was being applied to the purchase of the property. Mr. Khural said that Ms. Gill told him that she needed these letters in order to collect benefits for her child, but maintained that they did not reflect the amounts that she was paying towards rent, he maintained which were the full amounts of \$2,000 and \$2,250 described in the respective rental agreements.

- [15] He testified that "a month or two" before the scheduled completion date of February 28, 2017, he referred the defendants to his mortgage broker, after they told him that they were not able to get their application for a mortgage approved.
- [16] "Seven to ten days" before, he contacted his conveyancing lawyer and provided him with Ms. Gill's phone number. Ms. Gill subsequently told him that she had received a call from the lawyer. In cross-examination he added that she told him that she was "nervous" as a result of the call.
- [17] Mr. Khural also obtained a Form B, a document that is required in order to convey a strata property, from the strata's management company. The invoice from the management company is dated the same day as the scheduled completion, and contains a reference to a "rush fee".
- [18] Ms. Khural said that "as a follow up" she emailed the contact information for their lawyer to Ms. Gill the night before the completion date.
- [19] As far as they were aware, there were no other steps necessary from the vendor's side in order for the transaction to be completed. As Ms. Khural expressed it, "We were just waiting for the other side to submit their paperwork and we would follow accordingly".
- [20] However, Mr. Khural also said that before the completion date, on a date that he did not specify, Ms. Gill told him that they were unable to complete the purchase. She asked for their deposit back, as well as "some profit for the price increase of the property", which she specified should be \$50,000. He refused.
- [21] Ms. Khural provided an expert report from appraiser Steve Miller expressing the opinion that the value of #17 was likely \$605,000 on the intended completion date.
- [22] After the defendants did not complete the purchase on February 28, Mr. Khural asked them to vacate the townhouse. They asked for time to find a new home. He was not "in a hurry" to sell the unit or to have it vacant, so he agreed to rent it to them for an additional six months. They entered into another standard form residential tenancy agreement for this additional period, with an increased rent of \$2,250 per month. The addendum to this new agreement did not include the previous requirement that the defendants pay the strata fees among its terms. This change was reflected in the rent increase. The term about repairs in the previous agreement was replaced with one that simply stated that the defendants were responsible for all "minor maintenance".

- [23] In re-examination Mr. Khural elaborated that he had to pay \$2,216.10 in March of 2017 to cover strata fees that the defendants had not paid. He referred to a statement of account from the property management company confirming this payment. When he was recalled so that the parts of Ms. Gill's testimony that he had not originally been cross-examined on could be put to him, he indicated that it was possible that she had reimbursed him for the strata payments in cash, as she claimed in her evidence, and that he did not know whether the defendants still owed him anything for those fees. On that basis, the claim for those fees was deleted by Ms. Khural's counsel.
- [24] After this agreement expired in September 2017 the defendants continued on a month-to-month tenancy initially in the same monthly amount as under that expired agreement. There were no further written tenancy agreements.
- [25] On July 11, 2018, Ms. Khural served the defendants with a two-month notice to end their tenancy (under the legislation that length of notice applies to situations in which the landlord requires the unit for their own or family purposes). She and her husband had bought a two-bedroom apartment in Surrey and were contemplating either selling or moving in to #17. On July 30 she served a one-month notice, which applies to situations involving non-payment or other misconduct by the tenants. She explained that she had not received any response to the first notice, and some rental payments had been "short fallen or missed". Her goal remained selling the unit or moving into it with her husband.
- [26] The defendants applied to the Residential Tenancy Branch to set aside the notices. The adjudicator declined jurisdiction because they were alleging that they had acquired an interest in the property, beyond just their tenancy.
- [27] Ms. Khural compiled a table of the defendants' rental payments up to the month of trial. In essence, they paid the required \$2,250 per month under the March-September 2017 tenancy agreement, and the subsequent month-to-month tenancy, until the end of 2017. After a shortfall of \$150 in January 2018, they paid \$2,200 per month until August. They paid \$1,060 in August and \$1,300 in September and then from October 2018 to July 2021, they paid \$1,650 per month[2]. They did not pay rent for August or September 2021[3].
- [28] Her understanding was that the significant shortfall in the rent in August 2018 was because the defendants had to carry out some repairs themselves, but she did not receive any receipts or requests for reimbursement in relation to such repairs.

Defendants

- [29] Ms. Gill's version of events was starkly different.
- [30] She said that from the outset she expressed concerns that the purchase and sale agreement, which Mr. Khural said had been drafted by his realtor, should be done through a lawyer. Mr. Khural refused, and insisted that the agreement was fine, so they signed it on that basis.

- [31] She said that part of their initial agreement, which was not reflected in the written version, was that \$1,500 of the monthly payment would go towards rent and \$500 would go towards the eventual purchase of the unit by increasing the deposit. She insisted on this because they had only been paying \$1,300 in their previous rental, by which I took her to mean that such a large increase was only justifiable if a portion of it was allocated to the purchase. According to her, this was agreed to at the time they signed the written agreement, although they had a conversation about it "a couple of days" before the signing.
- [32] She explained that she had asked Mr. Khural to correct the agreement and he told her "let my lawyer come back and we'll go to the lawyer and get a proper document". This did not occur, so she asked for a document indicating how much her rent was, after which she received the letter signed by Ms. Khural of March 30, 2015 indicating that her rent was \$1,500 per month, as I have previously described. She agreed in cross-examination that she needed a letter confirming her rent in order to receive government support for her son, who has a disability. She also agreed that she had prepared the letter herself, but rejected the suggestion that the lower amount shown in the letter would have benefitted her funding request.
- [33] In addition she rejected the suggestion in Ms. Khural's evidence, that, when one added in the utilities, this equalled roughly the \$2,000 per month described in the written agreement. She maintained that the utilities were dealt with separately.
- [34] However, she agreed with the suggestion that even if \$500 of the \$2,000 per month that she and her husband paid from 2015 - 2017 was supposed to go towards the purchase, it was also forfeited when they did not complete the purchase on the completion date.
- [35] Mr. Sandhu confirmed in his evidence that "there was an amendment to be done in the paperwork" for the purchase and sale of #17, because it did not reflect that \$500 per month "was supposed to go towards our credit for the down payment."
- [36] After they signed the purchase and sale agreement, he had very little contact with Mr. Khural in the ensuing two years - Ms. Gill handled it.
- [37] Ms. Gill testified that in "the middle of 2016", they took advantage of the option to extend the closing to 2017, because of her husband's still-outstanding personal injury settlement.
- [38] Two or three months before the scheduled 2017 closing, she had a conversation with Mr. Khural at #17, in which she expressed the wish that she had a four-bedroom townhome. In response, Mr. Khural told her that he was willing to sell her and her husband #41, which had four bedrooms. He and his family were living in it after selling their previous house. He was able to make this offer because he was building a new house for his family at 128th and 68th. After he told her "about the price" (for #41, I took it), she said, "Okay, if you're willing to sell Unit 41, let's try Unit 41, but my interest is first to complete Unit 17", to which he responded, ""Well, Unit 17, I can just --we can just do the price difference or whatever, and then just take it to Unit 41."

- [39] She did not describe the price to purchase #41 that Mr. Khural had indicated in her direct evidence. In cross-examination she said they had agreed to \$530,000. During her examination for discovery she said she had made an agreement with him to purchase it for \$780,000. She explained that she had meant to say that he had asked for \$780,000 but that she had responded that similar units were going for \$530,000. She also agreed that during her examination for discovery she had twice confirmed that there had been an agreement with Mr. Khural to transfer the deposit and purchase #41 for \$730,000.
- [40] As the completion date for #17 approached, she pointed out to Mr. Khural that nothing appeared to be happening with respect to their purchase of #41. He explained that it would take him some time, but that they had his word that he would be "giving" them (which I took to mean selling them) #41.
- [41] When Mr. Khural did not "come with any paperwork or anything" she began preparing the financing to purchase #17. She did this through Alpha Mortgage. She applied for \$430,000 even though that would exceed the purchase price when it was combined with the deposit, because they wanted to purchase some furniture and do some painting and repairs in the unit.
- [42] While she accepted that pursuant to the terms of the agreement she and her husband were responsible for preparing all of the documents required for completion, she explained that Mr. Khural was "at my door every second day without notice, discussing about us taking over Unit 41". After Ms. Khural emailed her the contact information for their lawyer late in the evening on the 27th, Mr. Khural phoned her the next morning and told her he had asked his daughter to send it to her "just as a formality".
- [43] Ms. Gill said that the mortgage company was "in the middle of processing" their application, when she called Mr. Khural a week before the completion to get the information about his lawyer to carry it out. He told her that his lawyer was out of town. She asked him to "get the paperwork done" before the expiry of the upcoming completion date if he wanted to sell them #41. He responded that when the lawyer returned he would complete the paperwork necessary to do so. She then told the mortgage company representative to put the financing application on hold because "I will probably be getting Unit 41."
- [44] When she contacted Mr. Khural at other points before the closing date he provided the excuses that he was sick and that his daughter was out of town.
- [45] On the evening of the completion date, Mr. Khural came to her house. He told them not to worry, he would be getting them the paperwork for the purchase of #41. Mr. Sandhu confirmed this representation by Mr. Khural in his evidence. She said that they agreed that he would be selling them that unit, and that she and her family could stay in #17 while his house was being built on the same basis as they had until then. That was the reason for the six-month rental contract that they entered into, she said.

- [46] In other words, her evidence was that they did not complete the purchase of #17 on February 28, 2017, although they would have been in a position to do so, because of Mr. Khural's representations about selling them #41.
- [47] In cross-examination Ms. Gill agreed with the propositions that the upshot of her oral agreement with Mr. Khural is that she has the right to purchase #17 for the amount agreed in the written agreement and the right to purchase #41 for \$530,000.
- [48] To support the defendants' position that they would have been able to purchase #17, she provided her notice of reassessment for the tax year 2016 showing her income as \$23,849, tax documents from her husband's business showing his income of \$70,800 in that year, and trust statement from her husband's personal injury lawyer showing that he received a net settlement of \$69,005.15 on February 14, 2019. In cross-examination she said that the case could have been settled in 2017, but that based on Mr. Khural's representations that he would wait to sell them #41, they did not do so.
- [49] Finally, she provided an email from Mr. Bhatti, the consultant at the mortgage company with whom they dealt. He confirmed that the defendants came to see him in February 2017 for a mortgage on #17, that he requested proof of an additional down payment in order to obtain approval, which they indicated they would be able to provide, "but later on you asked me to hold off on the financing". Some other steps, such as obtaining an appraisal, would also have been required, he explained. He also confirmed that they asked him to assist in getting a mortgage for the same unit in September 2019, "but I was not able to proceed due to the court proceeding between yourselves and the seller". Ms. Khural's counsel very fairly agreed that these documents could be entered without requiring that their authors be called as witnesses, or that they be proven as business records.
- [50] In response to the suggestion that no appraisal had been obtained, Ms. Gill maintained that she told Mr. Bhatti that they had already done an appraisal, and that "the appraisal report went straight to" him.
- [51] Ms. Khural's counsel also raised the request he had made following, the examination for discovery, for proof that the defendants actually had the required additional down payment referred to by Mr. Bhatti. She said there was no deposit record of those funds because the money - \$40,000 - was to have been loaned to them by her husband's employer in the event that the deal went through. Mr. Sandhu confirmed that they had the required additional down payment by means of a loan from his employer, although he agreed that during his examination for discovery he had been unable to remember if they had any "funds on deposit" in relation to the purchase.
- [52] Mr. Sandhu confirmed that Mr. Khural had raised the possibility with them of switching to purchasing a four-bedroom unit, which they ultimately agreed to, but he situated this conversation after they had arranged the financing ("got a mortgage done" as he described it) with Alpha Mortgage, although in re-examination he said that Mr. Khural had first mentioned #41 in January of 2017. With respect to his involvement in obtaining the

mortgage, he clarified that he had only signed an authorization in relation to it, and that his wife had handled things with Mr. Bhatti. In particular, he was unaware of the requirement in Mr. Bhatti's letter that they still needed an appraisal in order to be approved.

- [53] Ms. Gill's friend Arnesh Lal initially testified that in February 2015, during a prayer ceremony at #17 before Ms. Gill and her family moved in, Mr. Khural, who was also present, told her that Ms. Gill was purchasing the property on a "rent to own basis", that in two years she would own it, and that then she would be moving to a four-bedroom property. He also told Ms. Lal who was looking to buy a property, that she could then buy #17. After Ms. Lal completed her evidence, Ms. Gill was allowed to recall her so she could clarify that she had intended to say that this conversation had actually occurred in February 2017, also during a prayer ceremony, and that she had confused which ceremony these things were said at.
- [54] Ms. Gill agreed that the increase to \$2,250 per month in the rental agreement that was entered into after the completion date was a reflection of Ms. Khural's assumption of responsibility for the strata fees. She obtained a letter from Ms. Khural dated February 27, 2017 (the day before the completion date) confirming that her rent was \$1,600 per month, although she maintained that the correct amount was actually \$1,650, as her later payments indicated.
- [55] In response to a question from me during her direct evidence, Ms. Gill said that there was never any change to the agreement that \$500 per month would be credited towards the purchase. In initially in cross-examination, she advised that once the rent became \$2,250 per month in March of 2017, only \$350 per month was credited towards the deposit. It was then pointed out to her that in her affidavit for the summary trial she had sworn that her losses included payment towards the purchase price of \$750 per month from March 1, 2015 to February 28, 2016, and \$600 per month from March 1, 2016 to March 2019. She responded that she had noticed that some of her former counsel's calculations were "out". It was also pointed out to her that during her examination for discovery she had advised that once she was paying "\$2,200" per month (it was not clear why the total figure of \$2,250 was not used) the difference between that amount and the rent of \$1,650, which totalled \$550, went towards the purchase price. She agreed that amount going towards the purchase price was incorrect.
- [56] According to Ms. Gill, things initially continued on a positive note after the completion date, to the extent that after she obtained the qualifications necessary to operate a daycare. Mr. Khural asked her if she would like to operate one in the basement of the house he was building. However, after she made repeated requests for updates on when the house would be finished (so that they could proceed with #41), she learned that he had suffered some financial difficulties, and at one point had been hospitalized for depression.
- [57] In July 2018, he arrived at #17 with a realtor, and told her that the unit was going to be listed for sale. He had decided not to sell #41 because his daughter and son-in-law were no longer going to move into the house he was building, so it would be too big just for him and his

wife. He reassured her that the person who would be buying #17 would be doing so as an investment, so she and her family could continue to stay there. He asked her to enter into another rental agreement to show the bank that it was a rental property, which would enable him to borrow more money, but no further agreement was ever presented to them. (In contrast, Mr. Sandhu testified that it was the six-month rental agreement that began after the completion date for #17 that Mr. Khural had told them was needed for his and his daughter's mortgage purposes.)

- [58] Ms. Gill said that at this point she realized that she and her husband were "basically losing everything [that they had] invested in this house so far." She requested a copy of the rental agreement. It was not clear from her evidence whether she was requesting a copy of the six-month agreement that was then in place, or asking that there be a written agreement to cover their tenancy after it expired. After her request, Ms. Khural served her with the notices to end tenancy that I have described, the first of which was dated July 11, 2018. She did not recall receiving the second notice at the end of July, but accepted that it had occurred.
- [59] Mr. Sandhu also described demanding the "legit paperwork" in relation to their agreement about #41. When he was shown his examination for discovery testimony that he had "never discussed anything" with Mr. Khural, he clarified that only did so "when things got messy." He agreed with the suggestion that he and Ms. Gill did not have a firm agreement in relation to #41, which he attributed to Mr. Khural keeping them "in limbo" and "changing his story all the time."
- [60] Ms. Gill said that during the period that Mr. Khural was trying to sell the house he offered to return their deposit and pay them \$70,000 "so you guys can move forward". Mr. Sandhu on the other hand, described this offer as being made during negotiations about the price to purchase #41, which he said took place on or just before the completion date for #17 - February 27 or 28, 2017.
- [61] Later in her evidence Ms. Gill testified that the issue of Mr. Khural selling #17 to someone else had first arisen in the summer of 2017, several months after their completion date for #17 and while the resulting rental agreement was still in force. After a friend told her the unit was for sale, which she did not believe, Mr. Khural showed up with a couple and wanted to show the unit to them. He claimed to be doing so only because the couple might be interested in buying it once Ms. Gill and her family moved (to #41, I infer she meant). Her friend Ms. Lal testified that she was taken to #17 by her realtor in July or August 2017 when she was looking to buy a house, and saw Mr. Khural there. When she expressed the concern that this was Ms. Gill's house Mr. Khural told her that Ms. Gill want renting it and he was selling it, and that when Ms. Gill and her family moved to "the four bedroom" Ms. Lal could buy it.

- [62] Ms. Gill said that she did not take any steps from the completion date until the end of July 2018 to enforce the alleged agreement to allow her to purchase either unit because she was continuing to discuss #41 with Mr. Khural. Beyond that, they had become good friends and she did not want to "go around suing him."
- [63] After they appealed the notices to the Residential Tenancy Branch, Ms. Khural told her that she would be handling everything in relation to #17 from then on. Mr. Khural later told her that he was attempting to settle matters between them "in a better way" but that "the children are not listening to me".
- [64] According to Ms. Gill, after the agreement with respect to #41 collapsed, she and her husband ended their previous practice of paying for repairs to the unit out of their own pockets, and started deducting the amounts they paid for that purpose from the rent. Their position was that if they were being treated like renters then Ms. Khural should be responsible for such expenses. This approach is reflected in the rent amounts for August and September 2018 which, as I have mentioned, were \$1,060 and \$1,300 respectively.
- [65] She said that she provided receipts for the repairs involved. Her former counsel had copies of those receipts but her copies were lost when her children cleaned the townhouse while she was away for an extended period, assisting her brother with medical problems.
- [66] The \$1,650 they paid from then on reflected their view of the portion of the \$2,250 they had been paying that was actually going towards rent under the alleged agreement.
- [67] Subject to their position that \$500 per month for all of the months in which they paid \$2,000 or \$2,250 per month under the rental agreements should be allocated towards their interest in the purchase of #17, Ms. Gill did not dispute the table of rent payments that was compiled by Ms. Khural.
- [68] She explained that they had not paid the rent for August and September 2021 because she understood, mistakenly as it turned out, that Ms. Khural was refusing to provide her with receipts for her rental payments.

Positions

Plaintiff

- [69] On the issue of credibility, Ms. Khural's counsel contrasts the straightforward and uncontradicted accounts of the events that she and her father provided, which find significant support in the documentary evidence, with the numerous inconsistencies and contradictions in the testimony of Ms. Gill and Mr. Sandhu.
- [70] With respect to the substantive issues, an overarching consideration is said to be the application of the parol evidence rule, which prevents extrinsic evidence being admitted to vary the express terms of a written agreement.

- [71] On the threshold issue of whether the defendants breached the purchase and sale agreement, counsel points to the steps taken by Ms. Khural and her father to prepare for the completion. In contrast once again, he submits that the defendants' claim that they were in a position to complete the purchase is contradicted by the outstanding steps that Mr. Bhatti lists in his letter confirming the extent of his involvement, and that in addition an adverse inference should be drawn from their failure to call him as a witness. They also failed to take the steps required of them under the agreement to complete the purchase.
- [72] In addition to the fact that it is not reflected in the written agreement, which incorporates the rental agreement and contains an "entire agreement" clause, the defendants' claim that \$500 of the rent payment each month was to go towards the deposit is undermined, according to counsel, by Ms. Gill's inconsistent statements over time about the amount that was to be allocated for that purpose. The letters from Ms. Khural attesting to lower amounts of rent were prepared by Ms. Gill for the purposes of obtaining disability funding for her son, and are not proof that the balance of the rent payment was allocated as Ms. Gill claims. In any event, as far as the pre-completion rent payments are concerned, any portions that were allocated to the deposit would have been forfeited along with the amount specified in the written agreement, because of the defendants' failure to complete.
- [73] As to the allegation that the original purchase and sale agreement was modified to apply to #41, Ms. Khural's counsel refers to the inconsistent evidence that Ms. Gill gave on the price they were to pay for that unit. The absence of certainty on the question precludes the formation of any binding contract. In addition, s. 59 of the Law and Equity Act requires contracts for the sale of land to be in writing, and there is no indication that any of the exceptions to the general rule are present here. Perhaps most importantly, the defendants have not made a claim in relation to #41 or joined its registered owners as parties.
- [74] Even if such an agreement had been made, counsel submits that the parol evidence rule would prevent it from being enforced, given its inconsistency with the express terms of the purchase and sale agreement, which applied only to #17.

Defendants

[75] The essential points of Ms. Gill's submissions included the following:

- Ms. Khural's position that no portion of the rent for #17 was allocated to the deposit is contrary to the common understanding of "rent to own", which Mr. Khural admitted was one of the options provided in his advertisement. That common understanding is that eventually the rent, or at least a portion of it, is deducted from the price when the property is eventually purchased;
- Mr. Khural relied on a standard form contract obtained from a real estate agent, but failed to comply with the term that the deposit be held by the real estate brokerage[4];
- The only reason the additional essential terms were not reduced to writing was because instilled trust in them that his oral representations would be honoured;

- The letters from Ms. Khural showing the amounts Ms. Gill was paying in rent, were prepared by Ms. Gill because neither of the Khurals' were willing to provide receipts for those payments, not because Ms. Gill was seeking to portray that lesser amount for funding purposes. Ms. Khural was unlikely to have signed them without reading them, or without intending to portray the payment situation accurately;
- Ms. Gill and her husband were unlikely to have moved from a situation in which they had been paying \$1,300 per month for rent to the much higher rent for #17 without acquiring a benefit for that increase in the increase of their deposit. If the purchase failed to complete because they could not qualify for a mortgage, they would not have remained as renters when they could have another rental property for much less;
- The reduction in the payments to the amount that represented the rent portion occurred once she realized that Mr. Khural was not going to honour his oral representations about selling them; and
- Sending their lawyer's contact information the night before the completion, which would not leave enough time for the necessary administrative steps to be carried out, was not a legitimate effort on the Khurals' part to complete the transaction.

Discussion

- [76] The outcome of this case turns on the credibility of the defendants' claims to have received additional representations from Mr. Khural beyond what is contained in the purchase and sale agreement. This relates to the addition of a term that \$500 of the rent each month would go towards the deposit. It also relates to the basis on which the agreement as written would not be completed - either because its subject matter was varied to substitute #41 for #17 as the townhouse to be purchased or, as appears to more closely align with the defendants' evidence, that they agreed not to complete the transaction, despite having been in a position to do so, as a result of representations that they could purchase #41 at a later date.
- [77] Before resolving these issues, a threshold questions arises of whether I am precluded from considering the evidence of oral agreements because of the express provisions of the agreement. While Ms. Khural's counsel has correctly stated the rule in its essential form, one of the "myriad" exceptions to it is with respect to evidence that establishes the existence of a collateral agreement: *Gallen v. Allstate Grain Co.*, (1984) 53 BCLR 38 (CA) at para. 35, *lve. to app. ref'd* [1984] S.C.C.A. No. 171.
- [78] In any event, in this case the applicability of the parol evidence rule to restrict extrinsic evidence of these collateral oral agreements is subsumed in the applicability of the "entire evidence clause" of the agreement. In *Turner v. Visscher Holdings Inc*, 23 BCLR (3d) 304 (CA) Chief Justice Finch explained:

15 I agree that courts have generally equated entire agreement clauses with the parole evidence rule... And I agree that a provision such as [the entire agreement clause in that case] must have been intended to have a broader effect than the parole evidence rule would have by itself, otherwise the clause would be redundant

Despite this, on the facts before the Court the Chief Justice was unable to infer an intention by the parties that the clause should apply to the oral agreement they had reached about a bonus. He emphasized at para. 17 that "[i]t is in every case a question of the parties' intention."

[79] Similarly, after an extensive canvass of the authorities Justice Fleming concisely stated the considerations that apply when considering the application of such a clause in *Grewal v. Grewal*, 2017 BCSC 573:

49 Considered together, the authorities establish the effect of an entire agreement clause on an oral collateral agreement depends primarily on the parties' reasonable intentions. The court determines whether they objectively intended the entire agreement clause to apply to a collateral agreement with reference to the factual matrix. Important factors are the sophistication of the parties, whether the terms of the written agreement were negotiated with the benefit of legal advice, the words used in the entire agreement clause and perhaps the extent to which the collateral agreement induced one party to enter into the main agreement.

[80] Three of these factors weigh in favour of receiving the evidence of the defendants on this issue. Ms. Gill cannot be described as a sophisticated purchaser, no legal advice was obtained by her in relation to the defendants' rights and obligations under the agreement, and the application of some of the rent to the deposit was at least one of the factors that they say caused them to enter into the agreement.

[81] Of course, before the effect of any oral agreements can be assessed, I must be satisfied that they were made, which is where the credibility analysis comes in.

[82] Resolving the alleged agreement with respect to the allocation of the rent is fairly straightforward.

[83] While the term "rent to own" in common usage may well refer to an arrangement under which some or all of the rent payments go towards the eventual purchase, that definition is not so universally applied that any other purported usage would be absurd. More importantly, this deal still made business sense even if the defendants' payments were not partially allocated to the deposit. They were making a firm purchase with a defined price and completion date, while having the benefit of a delay of up to two years to obtain their financing.

[84] Moreover, it seems clear that if an agreement on \$500 per month being allocated had been reached by the parties as an aspect of the purchase and sale agreement, Ms. Gill would not have sworn in her affidavit for the summary trial that her losses for these uncredited contributions were in two other amounts per month, one for each year that the agreement was outstanding, and with the second amount continuing until 2019 even though the

ostensible amount of rent changed within that period. How much was allocated under that agreement seems to be quite a simple question, one that I am satisfied that she would have been consistent in answering if any agreement had actually been reached with Mr. Khural with respect to it. I do not find it plausible that their previous counsel would have included those amounts in her affidavit in error, when his only source of that information was the defendants' version of the oral agreement, or that she would have sworn to their correctness on the same basis.

- [85] While it is true that Mr. Sandhu supports Ms. Gill's account of \$500 being the allocated amount, that does not alleviate the concern arising from her having sworn to inconsistent amounts, since on any version of events she was the one took the lead in negotiating with Mr. Khural, and Mr. Sandhu received his information from her. I also do not think the letter that Ms. Gill prepared for Ms. Khural's signature in 2015 is sufficiently conclusive to alleviate that concern, particularly given the unrelated purpose for which it was obtained (although it does no credit to Ms. Khural that she was willing to sign a letter that did not accurately reflect the amount of rent being paid). Finally, Ms. Gill's evidence that she would not have increased their rent from the \$1,300 that they were paying in their previous rental property without receiving some additional benefit, or that they would not have considered to rent #17 at its higher rent without representations from Mr. Khural about purchasing #41, is difficult to give weight to without a basis in the evidence to compare the size and quality of the former and current residence.
- [86] The question of whether there was an agreement not to proceed with the completion of #17 so that the defendants could purchase #41 is not as straightforward.
- [87] First of all, the question of whether one or both parties were in a position to compete the transaction turns out to be a bit of a red herring. If I accept Mr. Khural's evidence that he was advised by the defendants in advance of February 28 that they would not be completing, then Ms. Khural was entitled to retain the deposit without having to take any further steps towards completion. In such a situation, the contract is at an end, but the rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected: *Vanvic Enterprises Ltd. v. Mack*, (1985) 17 D.L.R. (4th) 177 (BCCA) at paras. 17 and 18, citing *Johnson v. Agnew*, [1980] A.C. 367 (H.L.) at pp. 889-90. A lack of awareness on Mr. Khural's part of this legal principle may account for the last-minute, and somewhat self-serving steps that he and Ms. Khural took to portray their readiness to complete - providing their lawyer's information the night before the completion and obtaining the Form B on the day of, paying a "rush fee" for the latter.
- [88] However, those steps do provide some circumstantial evidence that the Khurals needed to position themselves favourably in response to a received or anticipated repudiation of the agreement, which tends to support their version of events.

- [89] The letter from Mr. Bhatti was relied on by both parties to prove the truth of its contents, so I do not think any adverse inference should be drawn from the defendants' failure to actually call him as a witness. At the end of the day however, I think the effect of the letter is equivocal. On one hand, Mr. Bhatti's assertion that the defendants asked him to "hold off on the financing" suggests that they were directing that process, rather than failing to secure financing, as the statements described by Mr. Khural would suggest. On the other hand, it indicates that they had not yet actually provided him with proof of an additional down payment, although they told him that they would be able to do so, and that significant additional items - an appraisal, the purchase agreement and strata documentation - were still required before a "firm approval" could be sought. I do not know what to make of his reference to being asked to arrange financing for #17 once again in 2019, because it was not addressed in the evidence. This all leaves me no further ahead in deciding which version of the discussions leading up to the completion date is more believable. There is also no objective support in the evidence for the availability of the additional down payment that the defendants claim, and Mr. Bhatti did not say that they would inevitably have been approved.
- [90] Mr. Khural's evidence was certainly not without its shortcomings. It seems highly unlikely that discussions about possibly purchasing #41 at some point were completely invented by the defendants, even if no agreement was ever reached, but his evidence was completely silent on how, from his perspective that topic was ever raised and dealt with. He also did not explain how the defendants went from the six-month post-completion date rental agreement, which he said was intended to allow them to find another place to live, to month-to-month tenants until his daughter sought to evict them. The lack of any apparent urgency to re-sell #17 might tend to support the various machinations that the defendants describe with respect to the two townhouse units and the new house he was building. Perhaps most seriously, he was content to claim unpaid strata fees, only to abandon the claim as soon as he was confronted with the possibility that Ms. Gill had paid them in cash, which struck me as a somewhat cavalier approach.
- [91] For the most part however, his evidence came across as an unforced recollection of actual events, and he did not attribute any actions or statements to himself or the defendants that seemed unbelievable or illogical, or that were contradicted by other reliable evidence. Idiosyncratic details in his evidence that seemed to me to defy invention included his description of introducing the defendants to his mortgage broker after they told him they were encountering financing difficulties, and his narration of Ms. Gill's comment that the call from his lawyer had made her "nervous".
- [92] In contrast, the defendants' version of events concerning the agreement had some illogical aspects. Most seriously, Ms. Gill's evidence about having negotiated a firm price to purchase #41 (leaving aside the inconsistency with her examination for discovery about what price she agreed to) is inconsistent with her then needing to be reassured by Mr. Khural on the completion date for #17 that there would not be any problems with not yet having "the

papers" for that agreement. It also did not make sense, if a firm oral agreement about being able to purchase #41 had actually been reached, and Ms. Gill had actually negotiated the purchase price for that unit by that point, that she would still have "preferred" to pursue the completion of #17 first, to the point of testifying that she and her husband applied for financing in only the amount required to purchase #17. If they were completely taken in by Mr. Khural, as they described, there would be no reason to complete the purchase of the unit that they were no longer seeking. Finally on this issue I do not believe that if a firm deal had been struck the defendants would simply have let the written agreement for the sale of #17 lapse, without requiring some modification of it to reflect the change in unit. Instead, the only additional documents created during this period were the six-month rental agreement, and the letter prepared for Ms. Khural's signature (which was dated the day before the closing), now describing the rent as \$1,600 per month. The defendants may not be sophisticated purchasers, but they demonstrated intelligence and a keen awareness of the potential pitfalls surrounding home purchases in their evidence.

- [93] Overall, I find their position, as reflected in Ms. Gill's responses in cross-examination, that the oral agreement left them with a right to purchase either unit, to be unconvincing. Their actions during this period are more consistent with being unable to complete the purchase of #17 at that point, and then agreeing to continue as renters.
- [94] Ms. Lal's evidence was of no assistance in this regard. Despite her claim to have confused the two prayer ceremonies that Mr. Khural attended, the reality is that she specifically situated the statement by Mr. Khural about the defendants being able to purchase a four-bedroom house in two years at the time of their move into #17, both in response to my question and during cross-examination. In other words, her evidence was twice oriented to that specific time period, when on all the other evidence the subject of #41 had not yet arisen at that early stage. My sense is that Ms. Lal's desire to assist her friend over came her absence of any reliable memory on this point.
- [95] In short, I am not satisfied that any firm agreement was reached, either to substitute #41 in the existing purchase and sale agreement, or not to insist on its completion in light of the agreed purchase of #41. As my skepticism about Mr. Khural's categorical denials suggests, I think it is quite likely that the purchase of #41 was discussed by the parties as a possibility at some point, and it may have remained a possibility after the purchase of #17 failed to complete, but the state of the evidence does not allow me to conclude that it ever progressed beyond that stage.
- [96] This conclusion makes it unnecessary to consider whether any such agreement would have been binding in relation to #41, there being no written evidence of it, or whether a breach of it by Ms. Khural would have given rise to an order for specific performance.
- [97] Finally, there is the issue of the rental payments after February 28, 2017. It follows from my finding that there was no concluded agreement with respect to #41 that no portion of the subsequent rental payments were allocated to the deposit to purchase it, or #17. Even if that

conclusion had not been reached, Ms. Gill was even more inconsistent on the amount of these payments. In addition to the different price for the 2016-2019 period that she included in her affidavit, she responded to my question by indicating that the post-completion date amount going towards the purchase was initially \$350, and in her examination for discovery transcript she said it was \$550. Once again, I do not think it would have been difficult to describe the amount consistently if she was referring to a term of an agreement that had actually been reached.

Conclusion

[98] According, the plaintiff is entitled to:

1. Retain the deposit of \$20,000 on #17 in accordance with the provision of the written agreement;
2. Receive \$24,090 in unpaid rent from the defendants, plus the difference between \$2,250 and the amounts actually paid for rent from October 2021 to April 2022. If there is any dispute about those amounts there can be a reference to the Registrar, who will certify the results.

[99] The defendants must vacate #17 not later than April 30, 2022.

[100] The defendants' counterclaim is dismissed.

[101] The plaintiff has had substantial success, and unless there are any matters potentially affecting costs that have not already been raised, she will receive her costs at the ordinary level of difficulty. If the parties need to address costs they can provide written submissions through Supreme Court Scheduling, based on a timeline for the exchange and filing of those submissions that is convenient to them.

"Schultes J."

[1] The neutral citation for those reasons for judgment is 2021 BCSC 852.

[2] Rent for the period of November 2018 to March 2019 was not paid at the time it was due, but Ms. Khural received it pursuant to a consent payment order in March 2019.

[3] In the course of the trial the defendants provided rent payments in the amount of \$1650 per month for July and August to Ms. Khural's counsel. At the end of the trial I ordered that they continue to pay that amount per month to continue to occupy #17 until judgment was given, without prejudice to Ms. Khural's position that a higher amount per month was owed.

[4] This particular point does not survive a review of the language of the agreement, which does not require that it be held by the brokerage, and in fact explicitly provides that it will be held in trust by Ms. Khural.

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